Supreme Court, U.S.
FILED
AUG 29 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-2013

IN THE

Supreme Court of the United States

October Term, 1985

DUQUESNE LIGHT COMPANY, et al.,
Petitioners,

v.

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA, et al.,
Respondents.

REPLY TO OPPOSITIONS TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

*DAVID MCNEIL OLDS
DANIEL I. BOOKER
REED SMITH SHAW & MCCLAY
747 Two Mellon Bank Center
Pittsburgh, Pennsylvania 15219
412-288-3148

Counsel for Petitioners
Duquesne Light Company
Associated Electric Cooperative, Inc.,
Union Carbide Corporation and
United States Fuel Company

**Counsel of Record for Petitioners*

Of Counsel:
WALTER T. WARDZINSKI
LARRY R. CRAYNE
EUGENE E. ANDERECK
ROBERT L. DOAN
RICHARD P. LAWLOR
LEE A. RAU
MICHAEL E. LOWENSTEIN

HERBICK & HELD PRINTING COMPANY, PITTSBURGH, PA. 15233

BEST AVAILABLE COPY

ANTHONY J. POLITO
DAVID J. LAURENT
CORCORAN, HARDESTY,
WHYTE & POLITO, P.C.
Suite 210, Two Chatham
Center
Pittsburgh, PA 15219

Counsel for Petitioners
CONSOLIDATION COAL
COMPANY,
GILBERT FUEL CO.
and LA LUZ OHIO, INC.
d/b/a MUSKINGUM
MINING COMPANY, ROYALTY
SMOKELESS COAL COMPANY,
SHANNON POCAHONTAS
COAL COMPANY and
VIRGINIA CREWS
COAL COMPANY

JOHN W. LATELLA
F. REGAN NERONE
CAULEY, CONFLENTI
& LATELLA
1212 Manor Building
564 Forbes Avenue
Pittsburgh, PA 15219

Counsel for Petitioner
LUZERNE COAL
CORPORATION

GREGG M. ROSEN
ROSEN & MAHFOOD
628 Grant Building
Pittsburgh, PA 15219

Counsel for Petitioner
OLD HOME MANOR, INC.

HARRY L. HOPKINS
CHARLES C. PINCKNEY
LANGE, SIMPSON, ROBINSON
& SOMERVILLE
1700 First Alabama Bank
Building
Birmingham, ALA 35203

Counsel for Petitioners
PULLTIGHT COAL, INC.,
LAKESIDE COAL COMPANY
and KINLOCK COAL, INC.

JEFFREY J. LEECH
TUCKER ARENSBERG P.C.
1200 Pittsburgh National
Bldg.
Pittsburgh, PA 15222

Counsel for Petitioner
WEST NEWTON COAL
LOGISTICS COMPANY

JOHN L. KILCULLEN
KILCULLEN, WILSON and
KILCULLEN, CHARTERED
1800 M Street, N.W.
(600N)
Washington, DC 20036

Counsel for Petitioner
REITZ COAL COMPANY

Of Counsel:
RICHARD D. RIVERS
1500 Market Street
Philadelphia, PA 19102

BEST AVAILABLE COPY

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

REPLY 1

1. The Purchased-Coal Clause Differs Sharply From Agreements Previously Considered By This Court 1

2. The Third Circuit Decided A Matter of Substance When It Ruled That A Union Status Based Penalty Is Not Illegal Per Se 3

CONCLUSION 4

TABLE OF AUTHORITIES

CASES	PAGE
Amax Coal Co. v. NLRB, 614 F.2d 872 (3d Cir. 1980), *rev'd on other grounds*, 453 U.S. 322 (1981)	3
National Woodwork Manufacturer's Association v. NLRB, 386 U.S. 612 (1967)	1, 2
NLRB v. International Longshoremen's Ass'n, 53 U.S.L.W. 4919 (U.S. June 27, 1985)	1, 2
Pacific Northwest Chapter of Associated Builders v. NLRB, 654 F.2d 1301 (9th Cir. 1981), *aff'd in relevant part sub nom. Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982)	3
Riverton Coal Co. v. UMWA, 453 F.2d 1035 (6th Cir.), *cert. denied*, 407 U.S. 915 (1972)	3
STATUTES	
National Labor Relations Act as amended: 29 U.S.C. § 158(e) (1982)	2, 3

REPLY TO OPPOSITIONS TO PETITION FOR A WRIT OF CERTIORARI

Petitioners, signatory employers under the United Mine Workers of America ("UMWA") National Bituminous Coal Wage Agreement, seek a writ of certiorari for review of a decision that compels repeated trials to determine the legality in each application of a provision in the National Agreement that adds a fixed and unconditional penalty of $2.24 on every ton of coal purchased by a signatory from a non-signatory, while freely allowing purchases from other signatories.

In their separate Oppositions, Respondents assert that the decision below is an unremarkable application of the settled doctrine of *National Woodwork Manufacturer's Association v. NLRB*, 386 U.S. 612 (1967), and *NLRB v. International Longshoremen's Ass'n.*, 53 U.S.L.W. 4919 (U.S. June 27, 1985) ("ILA"). They also contend the Third Circuit really did not decide the legality of the clause and that review at this stage is not warranted.

We respond here to each of these contentions.

1. The Purchased-Coal Clause Differs Sharply From Agreements Previously Considered By This Court.

The purchased-coal clause of the UMWA National Agreement is unlike the provisions considered by this Court in *National Woodwork* and *ILA*. In *National Woodwork* the disputed clause required only that specified work be performed on the job site. The clause did not distinguish between off-job site work performed by union workers and off-job site work performed by non-union workers. The Rules on Containers in *ILA* were limited to protecting certain work traditionally performed on the

dock. The Rules required only that all such work be performed on the dock or that a penalty be paid.

By contrast, the UMWA National Agreement by its terms requires a signatory to discriminate in its dealings on the basis of union status. A signatory employer may freely purchase coal that might otherwise have been produced by its own employees, but can do so only from another signatory operator.[1] The clause on its face applies without regard to the wages and benefits paid by a non-signatory operator to its employees. The burden of the $2.24 per ton penalty can be avoided by the non-signatory only by becoming a UMWA signatory.[2]

This type of clause, because of its overbreadth—because it is not tailored strictly to satisfy legitimate union interests—can properly be condemned on its face as a violation of Section 8(e) of the National Labor Relations Act. The inquiry into subjective intent mandated in *National Woodwork* and *ILA* with respect to clauses that were neutral as to the union status of other employers simply is not necessary where, as here, a concern with union status is inherent in the terms of the contract.

---

1. The purchased-coal clause itself only requires payment when contributions to the Trustees have not previously been made. This must be read in conjunction with the UMWA pension plans, which are incorporated in the National Agreement, and which permit the Trustees to accept contributions only from "Employers." The term "Employer," in turn is defined as a signatory to the National Agreement. App. B, p. 23A.

2. The UMWA argues that the clause does not discriminate against non-signatories because it also applies to delinquent National Agreement signatories and UMWA organized employers not signatory to the National Agreement. The record does not reveal any effort to apply the clause to employers in either such category, assuming they exist. The Court of Appeals concluded that application of the clause to delinquent signatories would itself be illegal. App. 13a. Moreover, such applications would not alter the incontestable fact that a non-signatory can only avoid the imposition of the purchased-coal clause penalty by becoming a UMWA signatory.

2. The Third Circuit Decided A Matter Of Substance When It Ruled That A Union Status Based Penalty Is Not Illegal Per Se.

Lower federal courts, until the Third Circuit decision below, uniformly condemned clauses that on their face drew such a broad and absolute distinction between dealings among signatories and dealings with a non-signatory. *See, e.g., Riverton Coal Co. v. UMWA*, 453 F.2d 1035 (6th Cir.), *cert. denied*, 407 U.S. 915 (1972); *Pacific Northwest Chapter of Associated Builders v. NLRB*, 654 F.2d 1301 (9th Cir. 1981), *aff'd in relevant part sub nom. Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982); and *Amax Coal Co. v. NLRB*, 614 F.2d 872 (3d Cir. 1980), *rev'd on other grounds*, 453 U.S. 322 (1981). These courts have done so without relying on an elaborate inquiry into the union's purpose or the clause's effect. They have done so because such a provision is blind to whether the non-signatory pays its workers the same wages and offers the same benefits as are enjoyed by signatory employees. Such a provision also is blind to whether the work opportunities of the signatory's employees could possibly be affected by the purchase. The work of a signatory's employees will not be affected, for example, by a purchase of coal that the signatory is not capable of supplying.

To allow a clause that operates this way to survive summary judgment destroys a well-developed bright line rule of application of Section 8(e) of the National Labor Relations Act. It allows a union's proclamation of an innocent intent to justify the use of a chain saw when a scapel would accomplish the union's legitimate objective. The Third Circuit decision should be reviewed by this Court to prevent erosion of a union's obligation to be concerned with its means as well as its ends in seeking to avoid the effects of non-union competition.

CONCLUSION

For the reasons stated above and in our Petition for Certiorari the writ should be granted.

Respectfully submitted,

*DAVID MCNEIL OLDS
DANIEL I. BOOKER
REED SMITH SHAW & MCCLAY
747 Two Mellon Bank Center
Pittsburgh, Pennsylvania 15219
412-288-3148

Counsel for Petitioners
Duquesne Light Company
Associated Electric Cooperative, Inc.,
Union Carbide Corporation and
United States Fuel Company

**Counsel of Record for Petitioners*

Of Counsel:
WALTER T. WARDZINSKI
LARRY R. CRAYNE
EUGENE E. ANDERECK
ROBERT L. DOAN
RICHARD P. LAWLOR
LEE A. RAU
MICHAEL E. LOWENSTEIN

ANTHONY J. POLITO
DAVID J. LAURENT
CORCORAN, HARDESTY, WHYTE & POLITO, P.C.
Suite 210, Two Chatham Center
Pittsburgh, PA 15219

Counsel for Petitioners
CONSOLIDATION COAL COMPANY,
GILBERT FUEL CO. and LA LUZ OHIO, INC. d/b/a MUSKINGUM MINING COMPANY, ROYALTY SMOKELESS COAL COMPANY, SHANNON POCAHONTAS COAL COMPANY and VIRGINIA CREWS COAL COMPANY

JOHN W. LATELLA
F. REGAN NERONE
CAULEY, CONFLENTI & LATELLA
1212 Manor Building
564 Forbes Avenue
Pittsburgh, PA 15219

Counsel for Petitioner
LUZERNE COAL CORPORATION

GREGG M. ROSEN
ROSEN & MAHFOOD
628 Grant Building
Pittsburgh, PA 15219

Counsel for Petitioner
OLD HOME MANOR, INC.

HARRY L. HOPKINS
CHARLES C. PINCKNEY
LANGE, SIMPSON, ROBINSON & SOMERVILLE
1700 First Alabama Bank Building
Birmingham, ALA 35203

Counsel for Petitioners
PULLTIGHT COAL, INC., LAKESIDE COAL COMPANY AND KINLOCK COAL, INC.

JEFFREY J. LEECH
TUCKER ARENSBERG P.C.
1200 Pittsburgh National Bldg.
Pittsburgh, PA 15222

Counsel for Petitioner
WEST NEWTON COAL LOGISTICS COMPANY

JOHN L. KILCULLEN
KILCULLEN, WILSON and KILCULLEN, CHARTERED
1800 M Street, N.W. (600N)
Washington, DC 20036

Counsel for Petitioner
REITZ COAL COMPANY

Of Counsel:
RICHARD D. RIVERS
1500 Market Street
Philadelphia, PA 19102